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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 1009

THEODORE B. RUSSELL,

Petitioner,

vs.

THE TEXAS COMPANY, a corporation, FREDERICK T. MANNING DRILLING COMPANY, a corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR NORTHERN PACIFIC RAILWAY COMPANY IN OPPOSITION

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OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals for the Ninth Circuit (Appendix "A" of Petition) is reported at 238 F. (2d) 636.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(1) Whether the disposition by Northern Pacific Railway Company in 1909 of an odd-numbered section of land located in Dawson County, Montana, within the place limits of the land grant made to its predecessor by Section 3 of the Act of Congress of July 2, 1864 (13 Stats. 365), was in any manner governed or affected by the proviso contained in the Joint Resolution of May 31, 1870 (16 Stats. 378), that "all lands hereby granted to said Company, which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said Company, not exceeding $2.50 per acre."

(2) If so, whether the settlement and preemption proviso prohibited sale of the land without the minerals so as to render null and void every attempted exception and reservation of minerals.

(3) If so, whether a purchaser from the Railway Company of more acreage than could be acquired by settlement and preemption under the public land laws is estopped by acceptance of the deed to deny the validity of an exception and reservation of minerals included therein.

STATUTES INVOLVED

The pertinent provisions of the granting act of July 2, 1864, and of the Joint Resolution of May 31, 1870, are set forth in Appendix "B" at pages 19 to 25 of the Petition.

STATEMENT OF CASE

Petitioner brought this action December 8, 1952, in the United States District Court for the District of Montana to quiet title to Section 23, Township 17N., Range 53E., M.P.M., in Dawson County, Montana, and to have the exception and reservation by Northern Pacific Railway Company of the minerals in the section, and an oil and gas lease granted by the Railway Company to The Texas Company adjudged null and void. The section of land in question is an odd-numbered section, classified as non-mineral, located in the place limits of the land grant made by Sec. 3 of the Act of Congress of July 2, 1864, to aid in the construction of the Northern Pacific railroad, and was patented to defendant Northern Pacific Railway Company on June 24, 1902. Petitioner's title to the premises was acquired under special warranty deed dated July 14, 1944, and stems from a warranty deed executed and delivered on June 14, 1918, by defendant Northern Pacific Railway Company to one Millard Stubrud, assignee of one MaBelle Cobb, to whom the Railway Company had given a contract for deed dated November 30, 1909, agreeing to sell and convey to her the surface of the land with an exception and reservation of minerals. The deed to Stubrud, in accordance with the contract for deed, expressly excepted and reserved unto the Railway Company, its successors and assigns "all minerals of any nature whatsoever, including coal, iron, natural gas and oil upon or in

said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." This deed was duly recorded in Dawson County on June 26, 1918, and petitioner purchased the premises with notice thereof.

The sole ground upon which petitioner claims title to the minerals in the premises is that the settlement and pre-emption proviso contained in the Joint Resolution of May 31, 1870, precluded the Railway Company from excepting and reserving the minerals in this section of land, and rendered null and void its attempt to do so. The language of the Joint Resolution, however, clearly makes the settlement and pre-emption proviso applicable only to "lands hereby granted," and, as has been repeatedly held by this Court, the only lands granted by the Joint Resolution were lands on each side of the new line authorized from Portland, Oregon to Tacoma, Washington on Puget Sound. *United States* v. *Northern Pacific Railroad Company,* 152 U. S. 284, 294; *Northern Pacific* v. *DeLacey,* 174 U. S. 622, 628; *United States* v. *Northern Pacific Railroad Co.,* 193 U. S. 1; *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317, 337, 374. None of the lands granted in aid of the Portland-Tacoma line are in Montana.

The District Court granted the Railway Company's motion for summary judgment upholding the validity of its mineral reservations, and the Court of Appeals for the Ninth Circuit affirmed. District Judge Murray, who heard the case, felt that *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317, was determinative of the issue. The Court of Appeals held that petitioner was estopped from asserting that the mineral rights passed to Stubrud under the Railway Company's deed, since they were expressly excepted and

reserved by the terms thereof and petitioner claimed title through that deed and asserted no independent source of title. It said, however: "Even if we felt constrained to recognize the right of Russell to raise the question of the validity of the mineral reservation by virtue of the two granting acts, we are convinced that the holding in *U. S.* v. *N. P. Ry. Co.*, 1940, 311 U. S. 317, 61 S. Ct. 264, 85 L. Ed. 210, is determinative [illegible]."

While petitioner asserts (Petition, p. 11) that MaBelle Cobb, to whom the Railway Company contracted to sell the surface of section 23 in 1909, was "an actual settler," there is nothing to substantiate that assertion other than a provision in the contract that the purchaser would cultivate at least one-tenth of the tillable portion of the premises each year until three-tenths of all tillable land shall have been broken and put under cultivation. Moreover, the contract covered 640 acres of land, which could not be acquired by "settlement and pre-emption like all other lands" because the homestead laws limited settlers to one quarter section of unappropriated public lands, and provided that "No person who is the proprietor of more than 160 acres of land in any state or territory shall acquire any right under the homestead law" (R. S. Sec. 2289; Mch. 3, 1891, c. 561; Sec. 5, 26 Stat. 1097; 43 U.S.C.A., Sec. 161).

ARGUMENT

No reasons whatever exist for a review of the decision below by this Court. The question whether the settlement and preemption proviso of the Joint Resolution applies to any lands other than those in aid of construction of the Portland-Tacoma line has been so explicitly decided by this Court in the recent litigation between the Government and the Railway Company as to foreclose further argument on the subject and leave no substantial federal question to be decided.

1. There Is No Important Question of Federal Law.

One of the points explicitly decided by this Court in *United States* v. *Northern Pacific Railway Company*, 311 U. S. 317, was that the proviso of the Joint Resolution of May 31, 1870, requiring that granted lands be opened by the Company to settlement and preemption, applied only to the additional lands granted by that resolution opposite the Northern Pacific line from Portland, Oregon to Tacoma, Washington, and did not apply to lands granted by the original act of July 2, 1864. The contention of the United States in that case, as set forth on page 193 of its brief in this Court in Nos. 476 and 477, October Term, 1939, was that "the lands subject to the proviso were all the lands of the grant from Lake Superior to Puget Sound, and the same lands which might be subjected to the one 'mortgage by this Act authorized.'" This Court said (311 U. S. 317 at page 368):

> "We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement

and pre-emption, applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864."

It added a footnote that

"The legislative history is convincing: see Cong. Globe, 41st Cong., 2d Sess., pp. 2480-85; 2569-84."

What the Court meant by "the additional lands granted by that Resolution" is elsewhere in the Court's opinion made clear. At page 326, the Court said of the Joint Resolution:

"It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant."

On page 337, it said:

"An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor."

On page 374, the Court said:

"The Resolution made a new grant in aid of the Portland-Tacoma line."

The Court's understanding that all lands other than those in aid of the Portland-Tacoma line were "lands acquired under the grant of 1864," to which it held the proviso of the Resolution of 1870 inapplicable, is made clear by the Court's discussion of the Company's claim to indemnity resulting from the Tacoma overlap. The Court said (p. 374):

"The Company says that, under the 1864 grant pursuant to which the Cascade line was built, title to the place lands vested in the company on the date of definite

location, as of the date of the original grant; that these lands were thus lost to the grant of 1870 appurtenant to the Portland-Tacoma line; and that, the company was entitled to indemnity for them."

It then stated the question as follows: "Whether Congress intended, in connection with its later grant of 1870, to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question." If the Court had considered the lands opposite the Cascade line as not acquired under the 1864 grant, no problem would have been presented.

Prior decisions of this Court have clearly shown that no lands were granted by the Joint Resolution of 1870, except those in aid of the Portland-Tacoma line (the provision for a second indemnity belt not constituting a present grant of lands).

In *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U. S. 1, the Court held that Northern Pacific Railroad Company took title under its 1864 grant to certain lands within the place limits of its grant opposite a portion of its line in the State of Minnesota which was definitely located November 24, 1871, and that the St. Paul and Pacific could not acquire those lands under the additional grant in aid of its line made by the Act of March 3, 1865, because "the rule has long been settled that where different grants cover the same premises the earlier takes the title." If, as contended by petitioner, the Company's right to lands included in the 1864 grant depended upon a re-grant made by the Joint Resolution of 1870, the case was erroneously decided.

In *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, this Court held that the Joint Resolution "should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound."

In *Northern Pacific Railway Company* v. *DeLacey*, 174 U. S. 622, the land in controversy was within the primary limits of the land grant, both of the Portland-Tacoma line as definitely located, and the Cascade Branch, as definitely located across the Cascade Mountains to Puget Sound. The Court held that the Company acquired title to the land under the 1864 Act. It said (p. 628):

> "The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands."

When this Court said that the proviso of the Joint Resolution applied only to the additional lands granted by that Resolution "and not to lands acquired under the grant of 1864" it certainly did not mean, as petitioner argues, that the proviso was inapplicable only to lands earned by construction prior to May 31, 1870, for it knew that construction did not begin until February 15, 1870, and that there were no lands so earned and certified to the Company on May 31, 1870.

In asking this Court to re-examine the question thus explicitly decided by this Court as to the applicability of the settlement and preemption proviso of the Joint Resolution, petitioner advances three reasons:

(1) "That the decision of the court below lies athwart the congressional intent that public lands and their values granted solely in aid of railroad construction find their ultimate unencumbered disposition to the public at the stipulated maximum return of $2.50 per acre to Northern Pacific."

(2) That the 1940 opinion of this Court leaves the question undecided.

(3) That the doctrine of estoppel upon which the case was decided below is without application where the origin of title is Congressional Act.

It will at once be apparent that the first and third reasons relied upon are no reasons at all, for they assume the proviso of the Joint Resolution to be applicable to the premises in question, contrary to the 1940 decision of this Court. So far as congressional intent is concerned, the legislative history of the Joint Resolution leaves no doubt that it was the intent of Congress to confine the settlement and preemption proviso to the additional lands granted in aid of the construction of the Portland-Tacoma line. Hence the decision below cannot possibly thwart any congressional intent. And since the proviso of the Joint Resolution has been held by this Court inapplicable to lands acquired under the 1864 Act, petitioner cannot avoid the rule of estoppel on the ground that the origin of his title is a congressional act. As for the assertion that the 1940 opinion of this Court in *United States* v. *Northern Pacific Railway Company* serves to support this petition, it is demonstrably erroneous.

The arguments advanced by petitioner in support of his contention that the settlement and preemption proviso of the Resolution necessarily must apply to the entire grant of lands in aid of construction of the Northern Pacific furnish no reason for re-examination of the question by this Court. The Joint Resolution added nothing to the estate in the lands granted by the 1864 Act and was in no sense a re-grant of those lands. The estate granted by Sec. 3 of the 1864 Act was certainly not made less than a fee by the provision in Sec. 10 that "No mortgage or construction bonds shall ever be issued *by said Company* on said road or mortgage or lien made in any way except by the consent of the Congress of the United States" (italics ours), for the Company could sell and convey to any purchaser a fee title to granted lands, free of any restriction on the subsequent disposition thereof. Of course, as stated in *St. Paul and Pacific* v. *Northern Pacific*, 139 U. S. 1, 7, prior to construction of the railroad opposite the lands the Company could not so dispose of granted lands as to deprive the United States of the right to compel their application to the purposes of the grant or so as to prevent their forfeiture in case of the Company's failure to comply with its conditions. But it certainly is not correct to say that the Act of 1864 restrained alienation until patent issued. In any event, the Joint Resolution did not change the situation in this respect.

In the face of the clear evidence of congressional intent to be found in the legislative history of the Joint Resolution, there is certainly no point in endeavoring to ferret out a different intent from the language of the Resolution itself. And, of course, the provision in Sec. 3 of the Act of 1929 that "the passage of this Act shall not be construed as in any wise evidencing the purpose or intention of Congress to depart

from the policy of the United States expressed in the Resolution of May 31, 1870, relative to the disposition of granted land by said grantee," does not purport to determine or influence decision as to the application of the settlement and preemption proviso.

The assertion that "the opinion of this Court in United States v. Northern Pacific R. Co., brought pursuant to congressional act, serves to support this petition," is based on a misunderstanding of the court's decision, and attempts to put the court in the position of having made a decision which was precisely the opposite of that which it seemed to make. As above pointed out, the Court did definitely hold that the proviso "applies only to the additional lands granted by that resolution and not to lands acquired under the grant of 1864." The only point upon which it reserved decision was whether the Company's breach of the proviso by refusal to open lands subject thereto to settlement and preemption, together with other breaches of covenant claimed by the Government, had been so substantial as to disentitle it to call for further performance by the United States, or to recover any money compensation for abrogation of its selection rights. The statement on page 24 of the Petition that "the Court reserved the question as to whether the *proviso* applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands" is clearly incorrect, for the Court expressly held the proviso applicable only to "the additional lands granted by that resolution."

The Petition thus advances no substantial reason for doubting the correctness of the construction placed on the proviso by this Court in its 1940 decision or the controlling effect of that decision upon this litigation.

2. The Decision Below, Based on Estoppel, Was Clearly Correct.

The decision of the Court of Appeals was based primarily on the ground that petitioner, under the undisputed facts, was estopped to question the validity of the title of respondent Railway Company to the severed mineral fee in the premises, a decision with respect to the application of local law. Petitioner concedes that the rule of estoppel applied by the court below governs purely private conveyances and quiet title actions. He contends, however, that "this is not a case of private grant, but a reliance upon Congressional Act continually re-expressed, as the origin of a full title which renders the mineral reservation contrary thereto void," and he asserts that "the rules of estoppel in private conveyances have no application to this case." This position, of course, collapses, if, as this Court has held, the proviso of the Joint Resolution which he relies upon is not applicable to the lands in question. But, even if the proviso of the Joint Resolution be assumed to be applicable, the decision of the court below was clearly correct, whether or not the principle asserted by petitioner would be applicable in some other case, because the purchaser from the Railway Company of an entire section of land certainly cannot claim any rights under an act of Congress subjecting its lands to settlement and preemption "like all other lands" when the public land laws limit settlers to one quarter section of land, and provide that no person who is the proprietor of more than 160 acres of land in any state or territory shall acquire any right under the homestead law.

Nothing contained in the settlement and preemption proviso purports to prevent the Company from selling lands to

persons who may wish to acquire more lands than may be obtained by settlement or preemption, or who may not wish to preempt or occupy them. Certainly, if private individuals may claim any rights under the settlement and preemption proviso, such individuals must possess the qualifications of a preemptor, and must settle upon no more than a quarter section of land and must obtain such land as a preemptor may obtain other public lands.

The rights of a land grant railroad with respect to granted lands that are subject to such a settlement and preemption provision as is contained in the Joint Resolution of May 31, 1870, were carefully considered by Circuit Judge Dillon in Union Pacific R. Co. v. McShane, 24 Fed. Cas. 640. Section 3 of the Act of July 1, 1862, granting lands to the Union Pacific, concluded with a proviso that "all such lands so granted by this section which shall not be sold or disposed of by the Company within three years after the entire road shall be completed, shall be subject to settlement and pre-emption like other lands at a price not exceeding $1.25 per acre to be paid to the Company." Judge Dillon held that lands subject to settlement and preemption under that provision were not exempt from state taxation on account thereof. He said:

> "During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but 'subject' to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured

and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction — which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation."

This case was affirmed by this Court on appeal. *Railway Company* v. *McShane,* 22 Wall. 444. The Court refrained from deciding the question whether anyone having the proper qualifications had the right to settle on the lands in question and, upon tendering to the Company the $1.25 per acre price, to enforce his demand for title. The Court said:

"It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

"We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not;".

No individual could have compelled the Railway Company to sell to him, as a settler or preemptor entitled thereto under the proviso of the Joint Resolution of 1870, an entire section of land. To obtain more than a quarter section from the

Company he would be obliged to negotiate the purchase. After negotiating such a purchase and obtaining a deed from the Company he should certainly be estopped by his contract to assert the invalidity of an exception and reservation contained in the deed of any portion of the premises excluded from the sale by the agreed terms thereof. And any subsequent purchaser of his interest, obliged to claim title under that deed, should certainly be subject to the same rules of estoppel that apply to other purchasers of land.

CONCLUSION

The question which petitioner asks this Court to review has been expressly and explicitly decided by this Court in litigation between respondent Northern Pacific Railway Company and the United States of America, the parties directly concerned. No sound reason has been advanced by petitioner for doubting the correctness of this Court's decision of that question, based as it was upon the evidence of congressional intent afforded by the legislative history, which this Court found "convincing." Both courts below found this Court's decision of the question determinative of the case and the Court of Appeals found an additional and non-federal ground for rejecting petitioner's claim to the mineral estate. The petition for a writ of certiorari should accordingly be denied.

We cannot, however, refrain from commenting on petitioner's concluding suggestion that the decision of this Court on April 8, 1957, in *United States* v. *Union Pacific R. Co.* holding that the grant of right-of-way to that Company did not include the underlying minerals, supports the granting of this petition on the theory that, by over-

ruling prior decisions, land grant railroads can be stripped of the minerals discovered years after in granted lands classified as non-mineral and some supposed congressional intent effectuated. So far as the settlement and preemption proviso is concerned, the manifest congressional intent was to secure the speedy settlement of the country and could not have been frustrated or impeded by sales of land to settlers with exception and reservation of minerals, especially when the lands were not believed to contain minerals, other than coal and iron, which Congress expressly intended the Railway Company to have, and the lands had been classified as non-mineral. So far as minerals subsequently discovered on lands classified as non-mineral are concerned, congressional intent is not discoverable. But it is not apparent how any congressional policy with respect to settlers on the public domain or on lands granted to railroads can now be effectuated, seventy years after the completion of the railroad, by depriving the Railway Company of its reserved ownership of minerals in land grant lands for the benefit, not of the public generally, but of land speculators and other subsequent purchasers of those lands. On the other hand, income received by the Railway Company from such mineral resources furnishes it with funds sorely needed and actually used for additions, betterments and improvements to its railroad, which benefit the public it serves and effectuates the purpose for which the lands were granted.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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